SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 146

JOSEPH CHOBOT,
Appellant,

vs.

STATE OF WISCONSIN
Appellee.

On Appeal From the Supreme Court,
State of Wisconsin

MOTION FOR REHEARING OF ORDER DISMISSING APPEAL

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Appellant prays this Court for a rehearing of its order of October 23, 1961, wherein this Court, by a vote of 6-3, dismissed the appeal to review the judgment of the Supreme Court of the State of Wisconsin as prayed for in the appeal filed September 18, 1961, herein.

REASONS FOR GRANTING REHEARING

This Court has not yet made a clear legal determination on the two main issues of the case at bar. The first issue is whether nudity as such may, as a matter of law, be held to be obscene. The second issue is whether the concept of obscenity held by the Court is that of hard-core pornography.

Clarification by this Court will undoubtedly prevent wholesale chaos in many of the fifty states with respect to retail merchants who sell magazines containing pictures of nude and semi-nude women. Under the present cases, these merchants cannot possibly predetermine whether or not a magazine is obscene. Surely the circulation of a free press is impeded if standards for determining obscenity are so vague.

In the present case, the trial and appellate courts found four of thirteen magazines obscene. Of the four magazines, the lower courts found only Exhibit No. 10, *Spice* magazine, to have any obscene stories. Exhibits 8, 9, and 12, *Adam, Blondes, Brunettes and Redheads* and *Spree,* were found to be obscene because they contained "photographs of nudes interspersed with partially and scantily clothed models, some reclining in provocative poses." This conclusion is contrary to a decision of this Court.

Sunshine Book Company v. Summerfield, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 352, involved a nudist magazine.

The Court of Appeals in *Sunshine Book Company v. Summerfield,* 294 F. (2d) 114, quoted with approval the language of *Sunshine Book v. McCaffrey,* 8 Misc. (2d) 327, 112 N.Y.S. (2d) 476, 483, that:

> "Where the dominant purpose of nudity is to promote lust, it is obscene and indecent. The distribu-

> tion and sale of the magazines in this case is a most objectionable example. The dominant purpose of the photographs in these magazines is to attract the attention of the public by an appeal to their sexual impulses . . . Men, women, youth of both sexes, and even children, can purchase those magazines. They will have a libidinous effect upon most ordinary, normal, healthy individuals. Their effect upon the abnormal individual may be more disasterous." 249 F. (2d) 114, 118, 119.

The Court of Appeals decided *Summerfield* after *Roth-Alberts*. The United States Supreme Court in *Sunshine Book v. Summerfield*, 355 U.S. 372, reversed on the citation of *Roth-Alberts*, thus terminating the litigation and giving final protection to the material. Thus, nudity, in and of itself, as a matter of law cannot be found obscene.

The second issue which fairly cries out for Supreme Court clarification is whether this Court's concept of obscenity is synonymous with hard-core pornography.

Thus far, three State appellate courts have dealt with the above question, bringing about a conflict of decisions among highest State courts. New York in *The People v. Richmond News, Inc.*, 9 N.Y. (2d) 578, 216 N.Y.S. (2d) 369, 175 N.E. (2d) 681, held that printed matter could be prohibited as obscenity only if the matter were hard-core pornography. (See pp. 39-61 Appellant's Jurisdictional Statement.) The State of Wisconsin held to the contrary in the present case, and in the most recent case, *Monfred v. State*, 173 A. (2d) 173, the highest court of Maryland rejected the hard-core pornography concept albeit with a vigorous dissent. *Monfred v. State*, involved identical subject matter as the case at bar.

A telephone conversation with the attorney for *Monfred v. State* (supra) revealed the fact that a Petition for Certiorari was filed with this Court a few days ago. Accordingly, this Court can clarify the issue of obscenity with respect to hard-core pornography.

It should be noted that two authors who have written extensively in this field have opined of *Roth-Alberts,*

> "In voting to sustain the constitutionality of the obscenity statutes of California and of the United States, Justices Frankfurter, Burton, Clarke, Brennan and Whittaker must have had material of this kind in mind for hard-core pornography, particularly in pictorial form, is so blatantly shocking and revolting that it would have been impossible for the Justices to put it out of mind. Since the basic issue before the Court was only the constitutionality of the statutes on their faces and in a vacuum, without regard to their application in the two cases, it seems likely that the Court upheld their constitutionality as imaginatively applied to hard-core pornography.
>
> "We conclude therefore that the concept of obscenity held by most members of the Court is probably hard-core pornography, a conclusion consistent with the Court's rejection of obscenity as utterly without redeeming social importance." *Censorship of Obscenity: The Developing Constitutional Standards.* 45 Minn. L. Rev. 5 (1960) Lockhart and McClure.

The Solicitor General in the *Roth-Alberts* case supplied the Court with a good description of hard-core pornography. Essentially his description was that of,

> " . . . commercially-produced material in obvious violation of present law . . . manufactured clandestinely in this country or abroad and smuggled in . . . photographs of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts . . . drawings of perversions

> of various kinds . . . films showing people of both sexes engaged in orgies which again include every form of sexual activity known . . ." (for entire Solicitor General's description of pornography, see *Monfred v. State*, 173 A. (2d) 173, note 4, at P.P. 183, 184)

The Court may also choose to accept Chief Justice Warren's concept of "variable obscenity" expressed by him in his concurring opinion in the *Roth-Alberts* case to the effect that the question of obscenity must turn, not on the material itself but on the motives of the seller. In the existing case, since the sales were strictly commercial, a variable obscenity test may well be applicable. If the variable obscenity test were adopted, the appellant in the present case would be exonerated inasmuch as the magazines were openly sold and in fact purchased by uniformed police officers.

In addition to Petition for Certiorari in *Monfred v. State* (supra) having been filed after this Court dismissed appellant's appeal, there is also pending *Oakley v. United States*, No. 167, Petition for Certiorari filed June 22, 1961, wherein the following two issues are before this Court: First, are unretouched pictures of nude women obscene within the meaning of *Roth v. United States*, 354 U.S. 476, and *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, and second, should the fact that defendant believes his pictures not to be obscene be taken into account in determining his guilt or innocence.

CONCLUSION

The Supreme Court in *Roth v. United States,* 354 U.S. at p. 488 said, speaking of the fundamental freedoms of speech and press, that

> "ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring Federal and State intrusion in this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

If the conviction is allowed to stand in the present case without further opinion, the door barring State intrusion in this area will be left open wide enough to drive a truck through.

For the reasons set forth above and in the Jurisdictional Statement of appellant, it is respectfully urged that rehearing be granted and that upon such rehearing this Court assert jurisdiction to hear the appeal on its merits.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing motion for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Max Raskin

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